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MSHA V. U.S. STEEL MINING  
DDATE:  
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June 16, 1992  
SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v.

Docket No. WEVA 91-73

UNITED STATES STEEL MINING  
COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners  
DECISION

BY THE COMMISSION:

At issue in this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1988)(the "Mine Act"), is whether United States Steel Mining Company, Inc. ("U.S. Steel") violated 30 C.F.R. • 77.200, because its thermal coal dryer was losing fluidizing air current.(Footnote 1) Commission Administrative Law Judge George Koutras found

that U.S. Steel did not violate section 77.200, because the Secretary of Labor failed to establish that there was a hazard presented to miners. 13 FMSHRC 1465 (September 1991)(ALJ). The Commission granted the Secretary's Petition for Discretionary Review. For the reasons set forth below, we affirm the judge's decision.

I.

Factual Background and Procedural History

U.S. Steel operates the Pinnacle Preparation Plant located in Pineville, West Virginia. The plant's thermal coal dryer, a structure six stories high, dries fine coal by fluidization.(Footnote 2) Fluidizing air current is created by two

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1 30 C.F.R. • 77.200 requires:

All mine structures, enclosures, or other facilities (including custom coal preparation) shall be maintained in good repair to prevent accidents and injuries to employees.

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2 "Fluidization" is defined in the Department of Interior's A Dictionary of Mining, Mineral, and Related Terms ("DMMRT") as "[a] roasting process in which

finely divided solid materials are kept in suspension by a rising current of air (or other gas). This produces a fluidized bed which provides an ideal condition

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fans. One fan, located at the top of the dryer, pulls up the air current. This fan is 8 to 10 feet in diameter and is driven at 1200 revolutions per minute ("rpm") by an 800 to 1000 horsepower motor. The second fan, at the bottom of the dryer, pushes up the air current. This fan is 3.5 feet in diameter and is driven at 1700 rpm by a 300 to 400 horsepower motor. The air current allows fine coal to float across the drying bed where it is superheated to remove its moisture. It is carried upward as it dries and then settles on a conveyor belt.

On September 10, 1990, Mine Safety and Health Administration ("MSHA") Inspector Michael T. Dickerson conducted a regular inspection of the preparation plant. During his inspection of the thermal coal dryer at the feed end of the dryer bed, he saw hot coal embers and float coal dust and felt a current of fluidizing air coming through a fracture in the concrete floor, at about one-third of the thermal dryer's height. The length of the fracture was variously described as 3.5 feet and 8 to 10 feet and had been intentionally created at an earlier time in order to weld a seam on the dryer wall. Tr. 144, 171, 173. The inspector also observed a weld seam crack 3 to 4 inches long in the metal lining of the dryer bed.

Dickerson issued a section 104(a) citation for violation of section 77.200, alleging that the concrete floor at the feed end of the thermal dryer had deteriorated. The citation also alleged that there was leakage allowing live embers and small amounts of float coal dust to escape and allowing loss of small amounts of fluidizing air current. Dickerson designated the violation as significant and substantial.

Dickerson indicated before the judge, however, that the deteriorated concrete floor was not out of repair under the cited standard. Tr. 150, 153, 155, 160. Dickerson testified that the deteriorated floor played no part in the violation, since the purpose of the floor was not to enclose the fluidizing air from the dryer bed. Tr. 153, 155, 160. Rather, in Dickerson's view, the violation was caused by the split in the metal lining of the dryer. Tr. 153, 160. Dickerson testified that the violation pertained to the loss of the fluidized air current within the dryer, not to the hot embers and coal dust that floated out into the air since U.S. Steel's maintenance outside the dryer would ensure that any combustible material would not accumulate. Tr. 145, 146-47, 156, 159, 162. In sum, Dickerson believed that, if left unabated, the loss of the fluidizing air current could cause the coal dust inside to settle, become hot and ignite. He believed that this would pose a hazard of fire or explosion of the coal in suspension and expose the dryer attendant to serious injury. Tr. 137-38, 151, 156-57.

In his decision, Judge Koutras found that, although the primary purpose of section 77.200 was to assure the physical and structural integrity of surface coal preparation structures, the language of the standard was broad enough to cover a damaged and unrepaired dryer bed enclosure lining. 13 FMSHRC at 1472. He also concluded that the dryer bed enclosure was not

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for gas-solid reaction because each solid particle is in constant motion and in contact with the moving gas stream on all sides." DMMRT at 447.

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maintained in good repair. Id.

Judge Koutras found, however, that in order to establish a violation of section 77.200, the disrepair or condition of the cited equipment must present a hazard to miners. 13 FMSHRC at 1473. Based on the evidence of the case, he could not, however, conclude that the Secretary established that the leaking dryer bed enclosure lining presented such a hazard. Id. He noted that Dickerson had conceded that the escaping coal dust and coal embers did not pose a hazardous condition outside the dryer. Id. He further noted that, while Dickerson was primarily concerned with the loss of fluidizing air current inside the dryer, there was only a small amount of fluidizing air current coming through the cracked dryer lining and there was no evidence that air flow inside the dryer was restricted. Id. Accordingly, he concluded that U.S. Steel did not violate the regulation. Id.

II.

Disposition of Issues

On review, the Secretary argues that the judge erred in finding that U.S. Steel did not violate section 77.200. The Secretary first argues that, for a finding of violation, the judge required a showing of an actual hazard of a significant and substantial nature: "-- in essence the judge would require a finding of a 'significant and substantial' violation in order to make out a violation." PDR at 5. The Secretary also argues that the judge erred in not finding a hazard of a significant and substantial nature, based on the inspector's testimony.

Contrary to the Secretary's assertions, the judge did not equate a violation of section 77.200 to a showing of a hazard of a significant and substantial nature. The judge required only "that the disrepair or condition of the cited equipment [present] a hazard to miners." 13 FMSHRC at 1473. The judge did not, by requiring a showing of a hazard, require a showing of a reasonable likelihood that the hazard contributed to would result in an injury or illness of a reasonably serious nature, the prerequisite to a significant and substantial violation under Cement Division, National Gypsum Co. 3 FMSHRC

822, 825 (April 1981) and Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984).

Accordingly, we reject the Secretary's argument that the judge essentially required a showing of an actual hazard of a significant and substantial nature as a prerequisite to a finding of violation of section 77.200.

In addressing the Secretary's second argument, that the judge erred in not finding that the alleged hazard was significant and substantial based on the inspector's testimony, we find that the judge did not err. Substantial evidence supports the judge's finding that the weld seam crack in the dryer bed enclosure presented no hazard to miners. 13 FMSHRC at 1473. As the

Commission has consistently recognized, the term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." See, e.g., *Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1137 (May 1982) quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

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The judge noted Inspector Dickerson's concession that there were no hazards presented outside the dryer. 13 FMSHRC at 1473. The Secretary on review acknowledges that it was the loss of fluidizing air current inside the dryer unit that posed the potential hazard, not the material leaking out of the dryer. See PDR at 6 n.4; S. Br. at 2 n.1, 10-12. The judge further found that the alleged hazard inside the dryer related to restricted air flow that could result from loss of fluidizing air current. 13 FMSHRC at 1473. However, the judge found that there was no evidence of restricted air flow. *Id.*

Although U.S. Steel foreman David Walters testified that he observed a very small, gentle flow of air escaping through a 3 to 4 inch long hairline split in the metal lining, he stated that "it would take a large hole to short circuit [the effect of the] two fans." Tr. 167, 169, 170. Walters testified that a four-inch hairline crack would not short circuit the airflow and, in view of the volume of fluidizing air current produced by the two large fans, the effect of the split on the air current across the bed was insignificant. Tr. 169-70. Walters testified that there was no hazard of an accident or injury to anyone. Tr. 172.

Inspector Dickerson's testimony that the alleged hazard was significant and substantial in nature is not compelling. Dickerson, who was not qualified as an expert witness on thermal coal dryers and claimed no specialized experience or qualifications relating to them, stated that there was a reasonable likelihood that a fire or explosion would occur as a result of the loss of fluidizing air if it were unabated. See Tr. 133-35, 138. However, he did not explain how the small amount of fluidized air seepage involved in this instance would result in restricted air flow in the dryer and create a hazard, nor did he testify that the crack was likely to widen, creating greater seepage and resulting in restricted air flow. See Tr. 138, 151, 154, 159. Although Dickerson testified that dryer explosions were not an unusual occurrence, there was no evidence presented that such explosions occurred in connection with three to four inch seam leaks. See Tr. 138. Dickerson conceded that the small amount of escaping fluidizing air would pose a hazard only if it restricted air flow within the dryer. Tr. 159. As noted above, the judge found no evidence of restricted air flow. 13 FMSHRC at 1473. In short, the inspector's testimony did not prove that any hazard existed. Thus, we hold that the judge did not err in concluding that a violation was not established.

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III.

Conclusion

Accordingly, the judge's decision is affirmed.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner